

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CIVIL ACTION NO. 3:17-cv-05806-RJB

STATE OF WASHINGTON’S
RESPONSE TO THE GEO GROUP’S
MOTION FOR RELIEF FROM
DEADLINES

I. INTRODUCTION

Since February 2018, The GEO Group, Inc. (“GEO”) has refused to produce 3,000 core documents involving the Voluntary Work Program (“VWP”) and the Northwest Detention Center (“NWDC”) – pending review by Immigration and Customs Enforcement (“ICE”). After many attempts to resolve the discovery disputes without Court intervention, Washington filed a Motion to Compel on June 21, 2018. ECF 66. GEO cross-moved for a protective order to withhold responsive documents pending a review by ICE. ECF 63.

After reaffirming that Washington may “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” the Court granted GEO’s request for additional time for ICE review of three limited categories

1 of documents: (1) sensitive immigration information,¹ ECF 86 at 4; (2) GEO-ICE Contract and
 2 bids, *id.* at 6; and (3) documents that may be deemed subject to Department of Homeland
 3 Security Management Directive 11042.1 – For Official Use Only Policy, *id.* at 7. The Court
 4 ordered GEO to “produce all discovery resubmitted for review by ICE” by Friday, August 31,
 5 2018. *Id.* at 13. In other words, the Court granted GEO approximately six weeks to take the steps
 6 necessary to review the withheld documents prior to production. *Id.*

7 The six weeks have come and gone, and GEO now asks this Court for an additional four
 8 weeks, until October 5, 2018, to produce the approximately 3,000 documents it submitted to ICE
 9 for review. ECF 111 at 4 n.5, 9. Even while asking for this extension, GEO notes that October 5
 10 is an aspirational deadline because “GEO has no power to dictate when or how ICE conducts its
 11 review.” *Id.* at 6. Indeed, GEO’s inability to ensure that ICE performs a timely review is
 12 evidenced by the fact that ICE did not meet GEO’s August 27, 2018 deadline for review due to
 13 “current workloads and pre-approved leave[.]” ECF 112-4 at 1.

14 Washington needs these withheld documents to effectively prosecute this case and
 15 enforce its state laws. Washington’s ability to do so is compromised each day that GEO continues
 16 to delay producing responsive documents, particularly in light of the discovery deadlines that
 17 are quickly approaching, including:

- 18 • Disclosure of expert testimony – September 20, 2018;
- 19 • Discovery motions deadline – October 25, 2018;
- 20 • End of discovery – November 16, 2018.

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 22
 23 ¹ ICE asserted an interest in reviewing responsive documents for detainee information
 24 regarding “(1) 8 U.S.C. § 1367(a)(2) . . . the Violence Against Women Act . . . ; (2) 8 U.S.C. §
 25 1367, which prohibits the disclosure of T Visas, which relate to trafficking victims and of U
 26 Visas, which relate to victims of crimes; (3) 8 U.S.C. § 1255(a)(c)(5), which prohibits
 disclosure of information relating to Legalization/Seasonal Agricultural Worker claims; and (4)
 8 C.F.R. § 208.6 pertaining to asylum application . . . credible fear determination, or . . .
 reasonable fear determination[.]” ECF 86 at 3-4.

This Court should reject GEO’s request for relief from its discovery obligations and stand by its Order requiring production of the withheld documents. Inasmuch as the documents GEO provided to ICE for its review may contain confidential information – including sensitive immigration information or For Official Use Only (“FOUO”) information – the documents should be produced pursuant the terms of the Protective Order previously entered in this matter.

II. ARGUMENT

A. Legal Standard

A district court has discretion under Federal Rule of Civil Procedure 26(c)(1) to limit discovery “for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” *See Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981). However,

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action . . . the parties’ relative access to relevant information . . . [and] the importance of the discovery in resolving the issues”

Fed. R. Civ. P. 26(b)(1). Indeed, under “the liberal discovery principles of the Federal Rules [the resisting party]...carr[ies] a heavy burden[.]” *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). This is a burden that GEO cannot meet here nor can it show that there is good cause to delay production of the withheld documents.

B. Washington Would Be Prejudiced if this Court Extends the Deadline for the Production of Documents GEO Was Already Ordered to Produce

GEO asks this Court to force Washington to wait until *at least* October 5, 2018 before it receives documents responsive to its long-ago issued discovery requests. GEO’s request should be denied because it prejudices Washington. Discovery deadlines are fast approaching and Washington needs all documents and information responsive to its discovery requests. GEO’s refusal to produce all responsive documents hamstrings Washington’s ability to fully litigate its claims in at least three ways.

1 *First*, although GEO proposed a new deadline for producing documents it withheld
 2 pending ICE review, GEO provides this Court and Washington with no guarantee it will actually
 3 produce the documents when the proposed deadline arrives. This is because, as GEO concedes,
 4 GEO’s compliance with any new production deadline will be contingent on ICE completing its
 5 review of the withheld documents.² *See* ECF 111 at 6 (noting that “at this juncture [GEO] can
 6 only wait for ICE to finish its review until it may produce the resubmitted documents”). In fact,
 7 GEO has acknowledged that it can only meet the deadline if “ICE completes its review and
 8 delivers documents to GEO on September 30[.]” ECF 111 at 9. *See* ECF 111 at 1 (noting that
 9 “GEO cannot compel ICE to review the ... documents included in GEO’s resubmission on the
 10 Court’s timeline”). *See also* ECF 111 at 9 (“[a]ssuming ICE completes its review and delivers
 11 documents to GEO on September 30, the State will receive the remaining documents by October
 12 5th”). A deadline that is contingent on actions by a non-party that GEO does not control does
 13 not provide Washington meaningful assurance that it will obtain responsive documents that are
 14 critical to proving its case.

15 *Second*, Washington needs the documents to meet its own discovery obligations under
 16 the Scheduling Order. Washington faces impending discovery deadlines and GEO’s continued
 17 withholding of documents compromises Washington’s ability to meet them. GEO’s request to
 18 continue withholding documents from Washington until October 5 means that Washington
 19 would not receive key documents regarding NWDC and the VWP until approximately two
 20 weeks after its expert disclosures are due. The expert disclosure deadline, September 20, 2018,
 21 is quickly approaching and anything short of ordering GEO to produce the 3,000 withheld
 22 documents will unduly limit the scope of Washington’s expert report.

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 24
 25 ² Although ICE may have asserted an interest in reviewing responsive documents to
 26 protect against the disclosure of sensitive immigration information, its interests apparently have
 not motivated it to perform a timely review of just 3,000 documents.

1 *Third*, GEO’s proposed deadline for production is incredibly close to other discovery
 2 deadlines in this matter. October 5 is just three weeks before discovery motions are due and just
 3 a month before the close of discovery. The end of discovery is quickly approaching and
 4 Washington should not be denied access to necessary responsive documents due to delays of
 5 non-parties or GEO.

6 If GEO is allowed to withhold responsive documents, Washington’s ability to prepare its
 7 case will be undermined. In light of the foregoing, it is clear that unless this Court orders GEO
 8 to immediately produce the withheld documents without ICE review, Washington has no
 9 guarantee of when – or if – it will receive responsive documents and the continued delay will
 10 impede Washington’s ability to effectively litigate its claims. This Court should order GEO to
 11 produce the documents it withheld now, and save the Parties and the Court from the potential of
 12 readdressing this issue again in October – after the passage of the expert disclosure deadline and
 13 at the tail end of discovery.

14 **C. The Protective Order Provides Sufficient Protection for the Documents GEO**
 15 **Withheld Pending ICE Review**

16 GEO argues that it cannot be required to produce withheld documents prior to ICE review
 17 because “federal statute or regulations prohibit the disclosure of documents containing
 18 information pertaining to some detainees, such as Violence Against Women Act (VAWA)
 19 applicants, refugees and asylees, seasonal agricultural workers, T visa holders, and U visa
 20 holders.”³ ECF 111 at 7. However, this Court may order GEO to produce the withheld documents
 21 prior to ICE review, and insasmuch as they contain sensitive immigration information deem

22 ³ The Court previously rejected GEO’s arguments that federal law barred production of
 23 the withheld documents. *See* ECF 86 at 5-6 (finding that 8 C.F.R. § 236.6 “contemplates public
 24 disclosure of detainee personal identifying information” and that with redaction of “personal
 25 identifying information and modifications to the Protective Order, GEO can both satisfy its
 26 discovery obligations” and 8 C.F.R. § 236.6); *id.* at 6 (finding after “assuming that GEO is
 subject to [6 C.F.R.] § 5.44[(b)]” that “GEO can both comply with the rule and produce
 discovery”; *id.* at 7 (finding that DHS Management Directive 11042 does not preclude
 discovery)).

1 them “confidential” and protected pursuant to the terms of the Protective Order which governs
 2 the “production of confidential, proprietary, or private information for which special protection
 3 may be warranted.” ECF 70 at 1. Indeed, sensitive immigration information is one of the
 4 categories of confidential information covered by the Protective Order: “Personal immigration
 5 information or status, including resident identification numbers, A files, and all immigration
 6 administrative records and non-public immigration records[.]” *Id.* at 2. This means that the
 7 parties are already barred from disclosing sensitive immigration information – of the kind that
 8 ICE has expressed an interest in reviewing documents for – and are barred from disseminating
 9 publicly or to any non-party. *Id.* at 4-5. As the Protective Order provides a mechanism to shield
 10 sensitive immigration information from public disclosure, it effectuates the purported goals of
 11 ICE’s review – protecting detainee privacy. The Protective Order is sufficient to ensure that
 12 sensitive immigration information is not unnecessarily disclosed. As such, there is no need to
 13 wait for ICE to review the documents.

14 GEO also argues that “ICE review of all documents GEO has resubmitted ensures that
 15 non-party security and safety interests are not jeopardized[.]” However, withholding documents
 16 for this reason is beyond the scope of review that ICE proposed and that this Court approved.⁴
 17 See ECF 78 at 6 (not including non-party security and safety interests as a category of
 18 information ICE has asserted an interest in reviewing prior to production); ECF 86 at 4-10.
 19 Inasmuch as this Court has concerns regarding legitimate safety and security interests that may
 20 arise from the production of some of the withheld documents, the Court can amend the protective

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 22 ⁴ GEO cites two cases wherein the court entered orders protecting information related
 23 to employees at correctional facilities and security-related information: *Castillon v.*
 24 *Corrections Corp. of America*, No. 1:12-cv-00559-EJL, 2013 WL 4039478 (D. Idaho Aug. 6,
 25 2013) and *Solis v. Washington Department of Corrections*, No. 08-5362RJB, 2009 WL
 26 10676491 (W.D. Wash. Oct. 15, 2009). ECF 111 at 7. Neither case is helpful here as ICE did
 not assert an interest in reviewing documents for this type of information – nor did the Court
 order such a review. Presumably, documents that fall into this category were produced
 pursuant to this Court’s July 17, 2018 order and are subject to the Protective Order where
 appropriate.

1 order to include documents and information that would trigger the protections of DHS
 2 Management Directive 11042, which governs FOUO designation and handling procedures. *See*
 3 ECF 86 at 7 (“GEO may include FOUO information in its resubmission of discovery for review
 4 by ICE”).⁵ This approach is consistent with this Court’s previous finding that documents deemed
 5 FOUO are not automatically or categorically undiscoverable. *See id.* (“the mere designation of
 6 discovery as FOUO should not preclude its production”).

7 This Court’s Protective Order is sufficient to protect against disclosure of any potentially
 8 sensitive information either related to individuals’ immigration status or legitimate safety and
 9 security concerns. GEO should be ordered to produce withheld documents, and where
 10 appropriate, allow for protection of those documents under the Protective Order.

11 III. CONCLUSION

12 For the foregoing reasons Washington respectfully requests that this Court order GEO to
 13 immediately produce documents it has withheld for ICE review.

14 Dated this 5th of September, 2018.

15 Respectfully submitted,

16 BOB FERGUSON
 17 Attorney General of Washington

18 *s/ La Rond Baker*

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23 ⁵ If the Court is inclined to ensure that FOUO information is covered by the Protective
 Order, Washington proposes amending the Protective Order to include:

24 Information and documents designated For Official Use Only under the Department of
 25 Homenland Security Management Directive 11042.

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CERTIFICATE OF SERVICE

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5th day of September, 2018

s/ La Rond Baker
La Rond Baker